IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE TAIL RANCH, Appellants, vs. WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States of America, and STEWART L. UDALL, Secretary of Interior of the United States of America, Appellees.	NO. 22699

APPELLANTS' OPENING BRIEF

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H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE TAIL RANCH,	)	
Appellants,	)	
-vs-	)	No. 22699
WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States of America, and STEWART L. UDALL, Secretary of Interior of the United States of America,	)	
Appellees.	)	

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I N D E X

TABLE OF CASES

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

I

This is an appeal from a decision of a District Manager of the Phoenix District Office of the Bureau of Land Management and the decision of Stewart L. Udall, Secretary of the Interior, United States of America, concerning a purported cancellation of grazing allotments of the Appellants. Section 10 of the Administrative Procedure Act, Title 5, U.S.C., Section 109 (a), which said Section is also Title 5, U.S.C.A., Section 702, and reads as follows:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

provides statutory authority for jurisdiction in the federal courts.

II

This appeal involves the basic question whether Public Land Order No. 848, dated July 1, 1952, Volume 17, Federal Register, page 6099, provides a legal basis for cancellation of grazing allotments and effective withdrawal of public lands in excess of 5,000 acres by the U. S. Department of Defense after the enactment of Title 43, U.S.C.A., Sections 155, 156, 157 and 158. Public Land Order No. 848 provides the military with certain rights to withdrawal, subject, however, to valid existing rights; Title 43, U.S.C.A., Sections 155, 156, 157 and 158 provide that no withdrawals in excess of 5,000 acres can be made by the military without first obtaining approval from Congress for any such withdrawal, reservation or restriction of and utilization by the

Department of Defense for defense purposes the public lands of the United States of America.

III

Paragraphs I and II of Plaintiffs' Amended Complaint on Appeal from Administrative Decision, (T.R. page 1 and 2) set forth the necessary allegations to show the existence of the requisite jurisdictional allegations.

STATEMENT OF THE CASE

Appellants and their predecessors in interest have for many years occupied the public land in question as a lessee of the United States of America under what is commonly referred to as a Federal Grazing Allotment. The total acreage involved is approximately 136,680 acres divided between two ranches, one ranch has 79,880 acres, which is the subject

of this controversy, the other 56,800 acres. These lands were withdrawn from larger ranch units during World War II for purposes of desert training but were restored to the Bureau of Land Management as federal allotments after the termination of hostilities, and the leases of Appellants' predecessors in interest continued. On July 1, 1952 Public Land Order 848 was signed allowing certain withdrawal rights, but this Order was "subject to valid existing rights" which included the grazing rights of the Appellants. The Department of the Army recognized it did not obtain these rights under Public Land Order 848, and on the same date, July 1, 1952, the Department of the Army and the predecessors in interest of the Appellants entered into annual "Lease and Suspension Agreements",

under which Appellants' predecessors in interest leased their grazing rights to the army. These leases continued until July 1, 1958. The Department of the Army, however, failed to pay the consideration provided to be paid by the Lease and Suspension Agreements and when a Lease and Suspension Agreement was presented to Appellants for signature for a term beginning July 1, 1952 and ending July 1, 1962, (T.R. page 101 to 108) Appellants refused to sign said Agreement. During the entire time that the Lease and Suspension Agreements were in effect no attempt was made to cancel the grazing privileges of the Appellants or their predecessors in interest, each party recognizing that Appellants still retained the grazing rights. The Lease and Suspension Agreements allowing the Department of Defense to

utilize the acreage leased to Appellants' predecessors in interest was the only way the Department of the Army could stop Appellants'predecessors in interest from exercising their grazing rights thereon. During this period of time there was no attempt to cancel the leases on this acreage and the Bureau of Land Management recognized at all times that the Appellants had the leases on the land and issued the annual permits.

Appellants refused to sign the Lease and Suspension Agreement dated June 17, 1958, (T.R. 101-108) because it did not provide for the consideration which had previously been agreed to between the Corps of Engineers acting on behalf of the Army and the Appellants, and since Appellants had not been paid for any of the prior years ' Lease and Suspension Agreement. The Army refused to provide a

Lease and Suspension Agreement which incorporated the terms previously agreed to and failed to make any payments on the previous Lease and Suspension Agreement, and Appellants continued to refuse to lease its grazing rights to the Army and refused to sign a new Lease and Suspension Agreement. The Department of the Army thereupon requested that Appellants' leasehold interest be condemned and an action was filed in condemnation, and an order for delivery of possession issued by the Court January 14, 1958.

For more than eight years after Public Land Order 848 was signed on July 1, 1952, the Bureau of Land Management continued to lease these lands to Appellants and its predecessors in interest.

Thereafter, and on July 14, 1960, Warren J. Gray, District Manager, served

upon Appellants Eagle Tail Ranch and H. D. Mollohan, a notice of cancellation of the grazing allotment setting forth the fact that the lands had previously been withdrawn under Public Land Order No. 848 dated July 1, 1952, and notifying Appellants of the cancellation of the allotment as to the area included in the Lease and Suspension Agreement, (T.R. 35-40) although said Order expressly made the withdrawal subject to existing rights.

The decision of the District Manager was appealed through the administrative procedure of the Bureau of Land Management to the Secretary of the Interior, and when sustained by the Secretary of the Interior, this action was commenced in the District Court to review the validity of the actions of the Bureau of Land Management. Until this Motion for Summary Judgment was filed, the Department of the

Army took the position that the condemnation case, which by then had been refiled for a second five-year term, and which attempted to condemn the Appellants' lease to the public lands in question was controlling and that the government was legally holding the lands pursuant to said condemnation order. When the Plaintiffs' and Defendants' Motion for Summary Judgment was submitted this position was abandoned and the original position was again taken that the action of the Bureau of Land Management was supported by Public Land Order No. 848.

It is the position of the Appellants that Title 43, U.S.C.A., Sections 155, 156, 157 and 158 provide the only means by which the Department of Defense can withdraw and reserve for defense purposes the grazing rights of

these Appellants in the withdrawn public lands of the United States, and the Public Land Order No. 848 did not provide any right for withdrawal of or cancellation of Appellants' lease rights with the Bureau of Land Management.

This appeal presents only one basic question: Does the Congressional enactment contained in 43 U.S.C.A., Sections 155, 156, 157 and 158 constitute the basis upon which the Department of Defense could in July of 1960, withdraw Appellants' grazing rights in public lands for defense purposes, or did Public Land Order 848 withdraw these rights on July 1, 1952.

SPECIFICATION OF ERRORS

I

The Court erred in denying Appellants' Motion for Summary Judgment in that the

attempted cancellation of Appellants' grazing permits are null and void as a matter of law, since the purported cancellations were in fact withdrawals of Appellants' validly existing lease rights from the public domain for use as a military reservation without meeting the requirements of 43 U.S.C.A., Sections 155, 156, 157 and 158, and contrary to the express reservation of such rights in Appellants under Public Land Order 848, dated July 1, 1952.

II

The Court erred in granting Appellees' Motion for Summary Judgment for the reason that 43 U.S.C.A., Sections 155, 156, 157 and 158 provide the only basis upon which Appellants' validly existing lease rights could be cancelled and was contrary to the express reservation of such rights in Appellants under Public Land Order No. 848,

dated July 1, 1952; and the revoking of the allotment pursuant to the Taylor Act provisions, 43 U.S.C. 1958 Ed., Section 315 (b), constituted a withdrawal of validly existing lease rights from the public domain for use as a military reservation. The finding of law by the Court that Public Land Order No. 848, dated July 1, 1952, is still in effect is in error as are the findings of fact which were made in support of this conclusion of law, if from this we infer that said Land Order provided a basis for cancellation of Appellants' validly existing lease rights.

ARGUMENT

The actual question involved in this appeal is, as stated above, very limited in scope. The Appellee Warren Gray's purported cancellation of the grazing rights

of the Appellants was based solely upon Public Land Order No. 848, dated July 1, 1952. By giving this cancellation notice the Bureau recognized that Public Land Order No. 848 did not withdraw the existing grazing rights on the property and in the cancellation letter to Eagle Tail Ranch, dated September 15, 1959, (T.R. 30 and 31) Mr. Gray stated as follows:

> "This office has been advised by our Director that the public grazing lands administered by this office, which were included within the boundaries of the Yuma Test Station, were withdrawn from further grazing use except to the extent authorized by the terms of the then outstanding leases, licenses or permits. The withdrawal order further provided that upon expiration the existing leases, licenses and permits on the withdrawn public lands would not be subject to renewal.
>
> In view of the public withdrawal order provisions you are hereby notified that the public lands within your grazing allotment which were included within the boundaries of the Yuma Test Station are cancelled from your grazing allotment."

The statements made by Mr. Gray in said letter are completely false in that the said Public Land Order No. 848 makes no mention whatsoever of withdrawal of grazing rights and in fact the only reference made is a reference which makes said withdrawal subject to valid existing rights.

For convenience in reference by the Court there is reproduced below the said Public Land Order No. 848 as set forth in 17 Federal Register, page 6099-6100:

FEDERAL REGISTER

Tuesday, July 8, 1952 6099

Appendix—Public Land Orders

[Public Land Order 848]

ARIZONA

WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE ARMY IN CONNECTION WITH YUMA TEST STATION

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

Subject to valid existing rights, the public lands in the following-described areas in Arizona are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the Department of the Army in connection with the Yuma Test Station:

GILA AND SALT RIVER MERIDIAN

T. 1 N., R. 18 W.,
Secs. 6, 7, 18, 19, 30, and 31.
T. 2 N., R. 19 W.,
Secs. 6, 7, 18, 19, 30, and 31.
T. 1 N., Rgs. 20 and 21 W.
T. 2 N., Rgs. 20 and 21 W., unsurveyed.
T. 1 N., R. 22 W., unsurveyed.
Tps. 2 and 3 S., R. 14 W., unsurveyed.
Tps. 4 and 5 S., R. 14 W.
T. 6 S., R. 14 W.,
Secs. 1 to 21, inclusive;
Secs. 28, 29 and 30.
Tps. 5 and 6 S., R. 15 W.
T. 7 S., R. 15 W.,
Secs. 5, 6 and 7.
Tps. 5 and 6 S., R. 16 W.
T. 7 S., R. 16 W.,
Secs. 1 to 12, inclusive;
Secs. 14 to 20, inclusive.
T. 6 S., R. 17 W., unsurveyed.
T. 7 S., R. 17 W.,
Secs. 1 to 24, inclusive;
Secs. 26 to 30, inclusive;
Sec. 31, N½;
Sec. 32, N½.
T. 6 S., R. 18 W., unsurveyed.
T. 7 S., R. 18 W., part unsurveyed,
Secs. 1 to 33, inclusive;
Sec. 34, N½;
Sec. 35, N½;
Sec. 36, N½.
T. 8 S., R. 18 W., part unsurveyed,
Secs. 4 to 9, inclusive;
Sec. 17, N½;
Sec. 18.

6100

T. 5 S., R. 19 W., unsurveyed,
Secs. 5 to 8, inclusive;
Secs. 17 to 20, inclusive;
Secs. 29 to 32, inclusive.
Tps. 6 and 7 S., R. 19 W., unsurveyed.
T. 8 S., R. 19 W.,
Secs. 1 to 18, inclusive, unsurveyed;
Sec. 19, N½, SE¼;
Secs. 20 to 23, inclusive;
Sec. 24, W½;
Sec. 27, N½;
Sec. 28, N½.
T. 1 S., R. 20 W.
Tps. 2, 3, 4, 5, and 6 S., R. 20 W., unsurveyed.
T. 7 S., R. 20 W., part unsurveyed,
Secs. 1 to 28, inclusive;
Sec. 29, N½;
Sec. 30, N½;
Sec. 33, E½;
Secs. 34, 35, and 36.

T. 8 S., R. 20 W., part unsurveyed,
Secs. 1 and 2;
Sec. 3, N½;
Sec. 11, N½, SE¼;
Sec. 12;
Sec. 13, N½, SE¼.
T. 1 S., R. 21 W.
Tps. 2, 3, and 4 S., R. 21 W., unsurveyed.
T. 5 S., R. 21 W.,
Secs. 1 to 6, inclusive;
Secs. 8 to 16, inclusive;
Secs. 21 to 28, inclusive;
Secs. 32 to 36, inclusive.
T. 6 S., R. 21 W., part unsurveyed,
Secs. 1 to 5, inclusive;
Secs. 9 to 16, inclusive;
Secs. 21 to 28, inclusive;
Secs. 32 to 36, inclusive.
T. 7 S., R. 21 W.,
Secs. 1 to 4, inclusive;
Secs. 5, 8 and 17, those parts east of a line parallel to and ¼ mile east of Gila Canal;
Secs. 20 to 24, inclusive;
Secs. 9 to 16, inclusive;
Sec. 25, N½;
Sec. 26, N½;
Secs. 27, 28, 29, 32, 33 and 34.
Tps. 1, 2, and 3 S., R. 22 W., unsurveyed.
T. 4 S., R. 22 W.,
Secs. 1 to 30, inclusive;
Sec. 36.

The area described including both public and non-public lands aggregate approximately 892,570 acres.

This order shall take precedence over, but not otherwise affect, (1) the order of July 30, 1941, of the Secretary of the Interior establishing Arizona Grazing District No. 3, and (2) the orders of January 31, 1903, October 6, 1921, and March 14, 1929, of the Secretary of the Interior and the order of May 5, 1950 of the Bureau of Reclamation withdrawing lands for Reclamation purposes so far as such orders affect any of the above-described lands: *Provided, however,* That the Bureau of Reclamation shall have the right to construct and maintain storm water protective and drainage works on the lands withdrawn for reclamation purposes, and the Bureau of Reclamation or its permittees shall have the right to search for and remove construction materials on the lands withdrawn for reclamation purposes, subject to the prior written approval of the Commanding Officer of the Yuma Test Station.

It is intended the lands described herein shall be returned to the administration of the Department of the Inte-

rior when they are no longer needed for the purpose for which they are reserved.

R. D. SEARLES,
Acting Secretary of the Interior.

JULY 1, 1952.

[F. R. Doc. 52-7383; Filed, July 7, 1952; 8:45 a. m.]

At all stages of the appeals and in their Motion for Summary Judgment, Appellees have set forth in detail the law supporting the right of the Bureau of Land Management to cancel grazing allotments. Assuming that the Bureau has all of the rights which have previously been argued by the Appellees, this does not in any way touch upon the question of law involved in this appeal, since cancellation of grazing rights for other reasons would not be applicable to the present proceeding which is an attempted

cancellation for withdrawal purposes for the Department of the Army as described in the September 15, 1959 notices of cancellation. The only basis for the cancellation was Public Land Order No. 848 which expressly reserved the valid existing grazing rights of the Appellants from the withdrawal by the Department of the Army.

In Appellees' memorandum opposing Appellants' Motion for Summary Judgment, Appellees have taken the position that once the Public Land Order was signed on July 1, 1952, that Appellants had no further right in or to said land.

All the facts are to the contrary and can be summarized as follows:

1. The serving of the letters of September 15, 1959 and July 14, 1960 purporting to cancel said grazing leases constituted a recognition by the Appellees

that the Appellants had these rights at all times prior to June 30, 1960, the date of the purported termination. (T.R. 29-39)

2. The negotiation and signing of Lease and Suspension Agreements with the Appellants' predecessor in interest by the Department of the Army, effective on July 1, 1952, the exact same date that the Public Land Order became effective, constituted an immediate recognition by the Department of the Army that the grazing rights were not included in the withdrawal order and that a separate means would have to be taken to acquire this interest. (T.R. 51,55)

3. The filing of the condemnation action in 1958 for a term of five (5) years and the refiling of said action in 1962 for an additional five (5) year term constituted an express recognition again

by the Department of the Army that the Public Land Order did not provide it with the necessary withdrawal of the grazing rights of the Appellants. It is to be noted that the condemnation actions were brought under the general condemnation statutes of the United States and expressly included the entire 892,570 acres of federal lands. (T.R. 49-50, 56-57)

The key question then is not whether the Bureau of Land Management has an abstract right to cancel grazing permits or leases as argued by the Appellees in their Motion for Summary Judgment, (T.R. 17, 18, 19 and 20) but whether the Bureau of Land Management had a right to cancel the Appellants' grazing rights on the sole basis that the grazing rights had previously been withdrawn by Public Land Order No. 848 (T.R. 29-39).

It was not by chance that Public Land Order No. 848 does not give the United States any right to withdraw the lands from grazing use. Public Land Order No. 848 is an order based upon the authority of Executive Order No. 10355, dated May 26, 1952, 17 Fed. Reg. 4831. This Executive Order entitled "Delegation of Authority" delegated to the Secretary of Interior the authority given the President to withdraw lands of the public domain from settlement, location, sale or entry for water power sites, irrigation, classification of lands, or other public purposes to be specified in the Order of Withdrawals. This Executive Order was authorized by statute, 43 U.S.C.A. 141, and expressly limited the withdrawal of the public domain to the purposes set forth above. Section 141 is reproduced below for the convenience of the Court:

Section 141. Withdrawal and reservation of lands for water-power sites or other purposes. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, c. 421, § 1, 36 Stat. 847.)

Historical Note

The words "the District of," which preceded "Alaska" in the original text were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387. See § 21 of Title 48, Territories and Insular Possessions.

All lands which were occupied by settlers or persons entitled to make entries, etc., under the general homestead laws included in a tract of land west of the Navajo and Moqu reservations in Arizona, and withdrawn from settlement by executive order of January 8, 1900, were exempted from the operation of such withdrawal, and such settlers were authorized, within a prescribed period, to make homestead entries of not to exceed 160 acres of such land, and submit final proof of the existence of their rights at the date of the issue of the order of withdrawal, and patents were to issue therefor upon the payment of the legal fees and purchase price, by Act Aug. 11, 1916, c. 315, 39 Stat. 504 (doubtless omitted from the Code as temporary).

Cross-References

Provisions for reservation from location, etc., of lands within Indian reservations are contained in section 148 of this title.

Provisions for withdrawal from entry of lands required for irrigation works, and lands believed to be susceptible of irrigation from such works, and provisions for entry of lands so withdrawn, are contained in section 416 of this title.

Notes of Decisions

1. Name of Act.—This Act is known as the "Pickett Act." U. S. v. Grass Creek Oil, etc., Co. (Wyo. 1916) 236 F. 481, 149 C. C. A. 533.

2. Construction.—The President's power to make temporary withdrawals of lands from entry is not negatived by this act. U. S. v. Midwest Oil Co. (Wyo. 1915) 35 S. Ct. 309, 316, 236 U. S. 459, 59 L. Ed. 641, overruling (D. C. 1913) 206 F. 141. And see Wood v. Beach (Kan. 1895) 15 S. Ct. 410, 156 U. S. 548, 39 L. Ed. 528; Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co. (C. C. Kan. 1881) 13 F. 106, reversed on other grounds (1884) 5 S. Ct. 208, 112 U. S. 414, 28 L. Ed. 794; U. S. v. Payne (D. C. Ark. 1881) 8 F. 883; (1882) 17 Op. Atty. Gen. 258; (1889) 19 Op. Atty. Gen. 370; U. S. v. Midway Northern Oil Co. (D. C. Cal. 1916) 232 F. 619.

3. Withdrawals or reservations in general.—The authority given by this act, to withdraw temporarily from entry oil lands is limited to lands which are public lands when the withdrawal was made, and does not authorize the withdrawal of lands which had been previously selected by the state in lieu of school lands before it was suspected they contained oil. State of Wyoming v. U. S. (Wyo. 1921) 41 S. Ct. 393, 255 U. S. 489, 65 L. Ed. 742, reversing U. S. v. Ridgely (C. C. A. 1920) 262 F. 675.

The executive has the right to withdraw lands from entry, settlement, or other form of appropriation without special authority from Congress. Stockley v. U. S. (C. C. A. La. 1921) 271 F. 632, reversed on other grounds (1923) 43 S. Ct. 186, 260 U. S. 532, 67 L. Ed. 390.

In a proceeding to establish a trust under a claim of homestead rights in public lands, held, that the land was a part of that included in the federal act, creating the Smiley Commission (section 3), and was in reserve under executive order of May 15, 1876, and was not restored to the public domain by said commission's order of December 29, 1891, so that plaintiff acquired no homestead rights therein. Stevens v. Southern Pac. Land Co. (1921) 195 P. 712, 50 Cal. App. 596, Id., 195 P. 714, 50 Cal. App. 805, writ of error dismissed (1922) 42 S. Ct. 588, 259 U. S. 578, 66 L. Ed. 1072. Beggs v. Southern Pac. Land Co. (1921) 195 P. 714, 50 Cal. App. 806.

The executive order of December 15, 1908, withdrawing certain public lands in Louisiana from settlement and entry or other form of appropriation to secure the public interests and in aid of such legislation as might thereafter be proposed or recommended, was within the power of the executive. Mason et al. v. U. S. (La. 1923) 20 U. S. 535, 43 S. Ct. 200, 67 L. Ed. 390.

Nowhere in the law upon which the delegation of authority was predicated do we find any authority to terminate the grazing rights of lessees and allotment holders. When the law specified that withdrawals could be made from settlement, locations, sale or entry for water power sites, irrigation, classifications of land or other public purposes to be specified in the Orders of Withdrawal without specifically naming grazing rights or specifically setting forth a general clause covering other forms of appropriation, then it was clear that grazing was not intended to be covered by the law. It is apparent in reading the items which are specified above that each of these items can be accomplished without in any way substantially affecting the grazing rights or privileges of a lessee

or allotment holder. It should be noted again that Public Land Order No. 848 specifies that the withdrawal is "subject to valid existing rights".

The Department of the Army recognized the fact that grazing allotments were not to be withdrawn or cancelled in all of the actions taken by them in dealing with the lands under Public Land Order No. 848, as described above.

The position taken by Mr. Steiner, the Hearing Examiner in his findings of fact (T.R. 70, next to the last paragraph) was that "when the withdrawal was put into effect, the lands included therein were no longer 'federal range' under the administration of the Department of the Interior subject to license and permit under the Taylor Grazing Act, supra."

This statement is patently in error, since Appellants continued to lease these

lands from the government continuously from 1952 through 1960, and renewals were accomplished and assignments made showing the lands in question were included within the allotment boundaries continuously during that time. If the statement made by Mr. Steiner, the Hearing Examiner, had been true, it would not have been necessary for the District Manager to issue a cancellation notice since the Bureau of Land Management would not have had any authority over the lands.

The attempted cancellation of Appellants' grazing leases in 1960 was in fact an attempted withdrawal of the land from public domain for use by the Yuma Test Station as a military reservation.

Under these circumstances this cancellation was not possible without first obtaining approval from Congress for this withdrawal.

Congress had long been aware of the injustices which have been perpetrated upon various lessees of the federal government by the arbitrary and capricious acts of the Department of the Army in totally disregarding the long established rights of lease and allotment holders in public lands and in February of 1958, after long and protracted hearings, Sections 155, 156, 157 and 158 were added to the Public Lands Law dealing with withdrawals, being Chapter 6, 43 U.S.C.A. Copies of these sections are set forth below for the convenience of the Court:

§ 155. Withdrawal, reservation, or restriction of public lands for defense purposes; definition; exception

Notwithstanding any other provisions of law, except in time of war or national emergency hereafter declared by the President or the Congress, on and after February 28, 1958 the provisions hereof shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States, including public lands in the Territories of Alaska and Hawaii: *Provided*, That—

(1) for the purposes of this Act, the term "public lands" shall be deemed to include, without limiting the meaning thereof, Federal lands and waters of the Outer Continental Shelf, as defined in section 1331 of this title, and Federal lands and waters off the coast of the Territories of Alaska and Hawaii;

(2) nothing in this Act shall be deemed to be applicable to the withdrawal or reservation of public lands specifically as naval petroleum, naval oil shale, or naval coal reserves;

(3) nothing in this Act shall be deemed to be applicable to the warning areas over the Federal lands and waters of the Outer Continental Shelf and Federal lands and waters off the coast of the Territory of Alaska reserved for use of the military departments prior to the enactment of the Outer Continental Shelf Lands Act; and

(4) nothing in this section, section 156, or section 157 of this title shall be deemed to be applicable either to those reservations or withdrawals which expired due to the ending of the unlimited national emergency of May 27, 1941, and which subsequent to such expiration have been and are now used by the military departments with the concurrence of the Department of the Interior, or to the withdrawal of public domain lands of the Marine Corps Training Center, Twentynine Palms, California, and the naval gunnery ranges in the State of Nevada designated as Basic Black Rock and Basic Sahwave Mountain.

Pub.L. 85-337, § 1, Feb. 28, 1958, 72 Stat. 27.

Historical Note

References in Text. This Act, referred to in the text, means Pub.L. 85-337, which is classified to sections 155-158 of this title, section 2671 of Title 10, Armed Forces, and section 472(d) of Title 40, Public Buildings, Property and Works.

Prior to the enactment of the Outer Continental Shelf Lands Act, referred to in par. (3), means prior to August 7, 1953, which is the date of enactment of section 1331 et seq. of this title.

Admission of Alaska and Hawaii to Statehood. Alaska was admitted into the Union on Jan. 3, 1959 upon the issuance of Proc. No. 3269, Jan. 5, 1959, 24 F.R. 81, 73 Stat. c. 16, and Hawaii was admitted into the Union on Aug. 21, 1959 upon the issuance of Proc. No. 3309, Aug. 25, 1959, 24 F.R. 6868, 73 Stat. c. 74. For Alaska Statehood Law, see Pub.L. 85-508, July 7, 1958, 72 Stat. 339, set out as a note preceding section 21 of Title 48, Territories and Insular Possessions. For Hawaii Statehood Law, see Pub.L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as a note preceding section 491 of Title 48.

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

§ 156. Same; approval by Congress of over 5,000 acres for any project or facility

No public land, water, or land and water area shall, except by Act of Congress, on and after February 28, 1958 be (1) withdrawn from settlement, location, sale, or entry for the use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act, if such withdrawal, reservation, or restriction would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of enactment of this Act or since the last previous Act of Congress which withdrew, reserved, or restricted public land, water, or land and water area for that project or facility, whichever is later. Pub.L. 85-337, § 2, Feb. 28, 1958, 72 Stat. 28.

Historical Note

References in Text. The Outer Continental Shelf Lands Act, referred to in the text, is classified to section 1331 et seq. of this title.

The date of enactment of this Act, referred to in the text, means February 28, 1958, which is the date of approval of Pub.L. 85-337.

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

§ 157. Same; applications; specifications

Any application filed on and after February 28, 1958 for a withdrawal, reservation, or restriction, the approval of which will, under section 156 of this title, require an Act of Congress, shall specify—

(1) the name of the requesting agency and intended using agency;

(2) location of the area involved, to include a detailed description of the exterior boundaries and excepted areas, if any, within such proposed withdrawal, reservation, or restriction;

(3) gross land and water acreage within the exterior boundaries of the requested withdrawal, reservation, or restriction, and net public land, water, or public land and water acreage covered by the application;

(4) the purpose or purposes for which the area is proposed to be withdrawn, reserved, or restricted, or if the purpose or purposes are classified for national security reasons, a statement to that effect;

(5) whether the proposed use will result in contamination of any or all of the requested withdrawal, reservation, or restriction area, and if so, whether such contamination will be permanent or temporary;

(6) the period during which the proposed withdrawal, reservation, or restriction will continue in effect;

(7) whether, and if so to what extent, the proposed use will affect continuing full operation of the public land laws and Federal regulations relating to conservation, utilization, and development of mineral resources, timber and other material resources, grazing resources, fish and wildlife resources, water resources, and scenic, wilderness, and recreation and other values; and

(8) if effecting the purpose for which the area is proposed to be withdrawn, reserved, or restricted, will involve the use of water in any State, whether, subject to existing rights under law, the intended using agency has acquired, or proposes to acquire, rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use, and distribution of water.

Pub.L. 85-337, § 3, Feb. 28, 1958, 72 Stat. 28.

Historical Note

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

§ 152. Same; mineral resources

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: *Provided*, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with

the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved. Pub.L. 85-337, § 6, Feb. 28, 1958, 72 Stat. 30.

Historical Note

Legislative History: For legislative history and purpose of Pub.L. 85-337, see 1958 U.S.Code Cong. and Adm.News, p. 2227.

Cross References

Mineral leasing laws, see section 1 et seq. of Title 30, Mineral Lands and Mining.

These provisions clearly set forth the requirements that notwithstanding any other provisions of the law, that except in time of war or national emergency hereafter declared by the President or the

Congress on or after February 28, 1958, the provisions of Sections 156, 157 and 158 shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States.

This Act is an express limitation on the Department of Defense and is applicable in this case and binding in this instance.

A section by section analysis of the Act is set forth in Volume 2, U.S. Code Congressional and Administrative News, 85 Congress Second Session 1958, beginning at page 2227. In the hearing the Congressional Committee stated as follows:

> "2. Section 2 contains the basic provision of the bill, which establishes a requirement that withdrawals, reservations, or restrictions of more than 5,000 acres in the aggregate for defense purposes may hereafter be made only by act of Congress.

"The section contains language which would preclude the making of a number of cumulative withdrawals, each for less than 5,000 acres, where all would be used for any one defense project or facility of the Department of Defense.

3. Section 3 would lay a more adequate base for fully determining at the local level and for congressional consideration the resource impact of proposed withdrawals."

In its committee conclusion and recommendation, the committee stated as follows:

"Its early enactment will operate to return to the legislative branch the degree of control the committee believes necessary to assure that defense use of the public lands presently held will more nearly conform to long-established maximum public multiple resource use policy, and will make certain that future public lands acquisition by the military will be so conditioned as to assure conformance with the same policy..."

Under the Constitution, Congress has been given the sole power of dealing with the property and public lands of the United

States. Article IV, Section 3, Clause 2, Constitution of the United States. This is supported specifically in the section dealing with public property in 29 Corpus Juris Secundum, page 876:

"86. Public Property

a. Federal lands
b. Property of state and municipalities

a. Federal lands

Lands under the jurisdiction of the United States and by it devoted to particular purposes cannot be condemned under the eminent domain power of a state; as to public lands, the authorities disagree.

Lands devoted to a particular use by the federal government, and over which jurisdiction has been ceded to the United States, cannot be taken under the right of eminent domain of a state, unless such use has been abandoned. Public lands of the United States within a state, subject to sale and settlement, and not reserved for any of the purposes of national government, have been held to be subject to the state's right of eminent domain, although this right seems to be denied in a later federal

> case, which holds that public lands of the United States are within the exclusive control of congress and that no state may interfere with such control."

If the government desires to use the public lands of the United States for a purpose other than for which it is being used, it is necessary that this be done under provisions other than the condemnation provisions. Congress has repeatedly recognized this in the withdrawal statutes which have allowed withdrawals of lands by presidential proclamation, by military request, etc. This withdrawal right, however, was abused by the Department of Defense in the taking of great tracts of lands for which no public purpose was apparent. In order to remedy this, Section 156 of 43 U.S.C.A. was enacted. The Senate and House Reports accompanying H. R. 5538, which became Section 158 of

43 U.S.C.A., is very revealing in giving the purpose behind the new act. These reports are contained in Volume 2, U. S. Code Congressional and Administrative News, 85th Congress, Second Session, 1958, beginning at page 2227. It is earnestly requested that the Court read the entire report which sets out fully the reasons for the enactment of this limitation on the military and provides a memorandum of the Constitutional and statutory provisions, with the Court decisions, which show that Congress intended to pre-empt the field of use of public lands by the military when this act was passed. On pages 115-122 of the Transcript of Record, Appellants have set forth in their Motion for Summary Judgment certain excerpts from the Congressional hearings which preceded the passing of Sections 155, 156, 157 and 158 of 43 U.S.C.A. It is urged that the Court

read these excerpts to establish what was in the mind of the Congress when these statutory provisions were enacted.

From the above it should be apparent that the grazing rights of Appellants were not withdrawn by Public Land Order 848 and when this was attempted to be accomplished in 1960 by the Bureau of Land Management by the purported cancellation of Appellants' lease rights this could not be done without first complying with the withdrawal limitations set forth in 43 U.S.C.A., Sections 155, 156, 157 and 158.

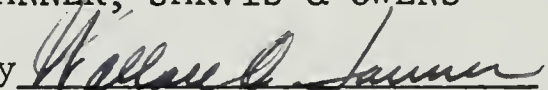
CONCLUSION

It is therefore respectfully submitted that Appellants were entitled to have their Motion for Summary Judgment granted and that the Court erred in not granting said Motion for Summary Judgment. It is further respectfully urged that the Court reverse

the decision of the District Court and order the Court to enter summary judgment for the Appellants herein.

Respectfully submitted this 27th day of June, 1968.

TANNER, JARVIS & OWENS

By 
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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these Rules.

TANNER, JARVIS & OWENS

By 
Wallace O. Tanner

This will certify that three copies of the Appellants' Opening Brief were served upon the United States Attorney at the Federal Building, Phoenix, Arizona, as attorney for Appellees, and three copies were mailed to the Assistant Attorney General, Land and Natural Resources Division, Attention: Jacques B. Gelin, Clyde O. Martz, and Raymond N. Zagone, Attorneys in the Department of Justice, Washington, D. C., 20530, this 28th day of June, 1968.

Wallace O. Tanner

Wallace O. Tanner